Mr. Ong Huck Lim for the respondents contended that the debt had merged in the judgment debt and lost its character as a pre-occupation debt and that section 4 of the Debtor and Creditor (Occupation Period) Ordinance did not apply.

On the question of merger it is clear that the original debt is no longer actionable and as this is the result of the deliberate act of the applicants there can be no doubt of their intention to extinguish it. The original debt has therefore, I think, merged in the judgment debt both at law and in equity. But I do not think that is the real point in this matter.

The application is under the Japanese Judgments and Civil Proceedings Ordinance, 1946, which directs the Court to take into account provisions which are now to be found in the Debtor and Creditor (Occupation Period) Ordinance, 1948. The duty of the Court is to construe and apply those provisions according to their intention. The Ordinance aims at giving some relief to persons in the position of the applicants, who have given valuable consideration in terms of pre-war currency and have only received the less valuable Japanese currency in return, and this must be borne in mind when construing it.

The applicants put an end to all doubts as to their rights against the respondents by obtaining judgment against them for value received in pre-war days. They took no steps to enforce the judgment and the respondents after waiting twenty months took advantage of a period of financial chaos when the end of the war was imminent to satisfy the judgment in almost worthless Japanese currency. In my opinion the circumstances are exactly such as the Ordinance is designed to relieve.

The applicants in obtaining judgment against the respondents did nothing to alter the debtor and creditor relationship of the parties or to debar them from the benefit of the Ordinance and to construe the term "pre-occupation debt" as narrowly as the respondents suggest so as to deprive the applicants of their right of relief under the Ordinance would, I think, be contrary to the clear intention of the law.

I therefore grant the order applied for. The amount paid by respondents must be re-valued in accordance with the Debtor and Creditor (Occupation Period) Ordinance and a judgment of this Court for the balance found to be due substituted for the judgment of the Japanese Court.

Costs to be paid by respondents.

Order accordingly.

WILLIAM HORACE SAULT
v.
NORIAH BINTE OSMAN.

[Orig. Civ. Juris. (Pretheroe, J.) May 9, 1950]

[Malacca — Originating Motion No. 11 of 1949]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11(5) — Application by Originating Motion — Whether oral evidence can be given at hearing of motion — Rules of the Supreme Court, Order 36 rule 1 and Order 49 rules 1 — 7 and 10.

In this Originating Motion the applicant claimed certain relief under section 11(5) of the Debtor and Creditor (Occupation Period) Ordinance, 1948. Affidavits were filed by both parties. When the motion came up for hearing counsel for the respondent applied for leave to call witnesses to prove that the repayment of the mortgage debt had been compelled by duress. The applicant opposed the motion on the ground that the Court had no jurisdiction to authorise the calling of witnesses in a motion such as that before the Court.

Held, (1) that on the hearing of motions witnesses may, with the consent of the Court, be called in exceptional cases where it is not possible to ascertain the essential facts; (2) that in the present motion the witnesses desired to be called could have given evidence by affidavit and the fact that they had not done so was not a ground on which an application to call them as witnesses could be successfully based; (3) that in this case therefore the oral evidence in support of the respondent could not be given.

Cases referred to:—

(1) *Dean and Chapter of Chester v. Smelting Corporation* (1902) W.N. 5.

(2) *Leiserach v. Schalit* (1934) 2 K.B. 353.

ORIGINATING MOTION.

Applicant in person.

C. S. Jayaswal for the respondent.

Pretheroe, J. : — In this Originating Motion Mr. Sault claims certain relief under sub-section (5) of section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. Affidavits have been filed by both parties and the motion came up for hearing on the 15th March last. When the motion was called Mr. Jayaswal, Counsel for the respondent, immediately applied for leave to call witnesses to prove that the repayment of the mortgage debt had been compelled by duress. Mr. Sault opposed the application on the ground that the Court had no jurisdiction to grant it. He referred to the rules relating to motions *viz.* rule 1 of Order 36 and rules 1 to 7 inclusive and rule 10 of Order 49 of the Rules of the Supreme Court and submitted that none of these rules gave the Court jurisdiction to authorise the calling of witnesses in a motion such as this now under consideration. He also referred to the note appended to rule 5 of Order 49 in the Straits Settlements Practice which states that

"under special circumstances the Court may permit oral evidence to be given by persons other than the deponents" but submitted that the English authorities showed that in fact such permission was only given in cases where an arbitrator's award was the subject matter of the motion. Mr. Sault cited English precedents and referred to certain comments in text books.

In his reply Mr. Jayaswal submitted that there is no rule which prevents the Court acceding to his application and that the cases cited by Mr. Sault did not support the restricted interpretation put upon them by Mr. Sault.

In view of the fact that the pre-occupation creditor has an option under section 11(5) of the Ordinance to initiate action either by way of an originating motion or by way of an originating summons and as many of the alleged debtors are not represented by Counsel and know nothing about the preparation and filling of affidavits the point raised in this case is of some importance. If the evidence of witnesses who are not deponents on the record cannot be heard respondents who are not represented by Counsel will be at a grave disadvantage in cases where the applicants have elected to proceed by way of motion. For this reason I took time to consider my decision.

It was common ground that the English rule 1 of Order 38 and rules 1 to 4 inclusive of Order 52 are similar in effect to the rules of this Court to which I have already referred. In a note appended to Order 52 rule 4 in the Annual Practice the following appears "Evidence beyond that in the affidavits is admissible *Dean and Chapter of Chester v. Smelting Corporation*[1]. The rule does not prevent the Court from permitting oral evidence to be given by persons other than deponents in special circumstances, *e.g.* on a motion to discharge an award where the facts were in dispute *Leiserach v. Schalit*[2]". Mr. Sault submitted that these comments apply solely to the motions referred to in rule 4 of Order 52 *viz.* motions to set aside, remit, or enforce an award or for attachment. But this is not the opinion of the compilers of the Annual Practice as a comment in similar terms, and citing *Leiserach's* case, is appended to rule 1 of Order 38 and that rule applies to "any motion, petition or summons".

In *Leiserach v. Schalit*[2] Counsel on each side referred to certain rules but in his judgment Humphreys, J. did not base his decision on any rule and in fact did not even refer to any rule. He said :—

> "It is also a case in which it is essential, in order to do justice, that the Court should be enabled to make up its mind as to the actual facts of the case. In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from a perusal of the affidavits on one side and the other — namely, what are the essential facts of the case. On that ground and on that ground only the Court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators in the matter."

It is clear therefore that both Humphreys, J. and Macnaghten, J., who agreed with the decision of Humphreys, J., were of opinion that "in an exceptional case" the Court had jurisdiction to call as witnesses "independent persons" if such a course was essential in the interests of justice to ascertain the essential facts. The jurisdiction claimed was general and not limited to motions relating to awards and attachment. I have been unable to trace any subsequent case in which this decision has been either challenged or criticised.

I have only been able to trace two references to this subject in the text-books at my disposal. The comment in *Halsbury's* Laws of England (2nd edition) volume 26, page 109, paragraph 214 is as follows :—

> "The evidence in support of the motion is generally given by affidavit, but oral evidence may be heard".

A footnote then cites the *Dean of Chester's case*[1]. At page 1353 of the second volume of *Daniel's* Chancery Practice (8th edition) it is stated that "the evidence on a motion is usually given by affidavit, but oral evidence may be made of . . . .". As the comment in *Halsbury's* Laws of England appears in a section dealing with proceedings peculiar to the Chancery Division it may be contended that this procedure is peculiar to the Chancery Division. I do not think that can be maintained as *Leiserach's* case itself was decided in the King's Bench Division.

In passing I may remark that there are a considerable number of reported cases in the former Chancery Court where, on motions, evidence was ordered to be taken. As far as I have been able to trace however in every case these motions were brought under section 15 of the Chancery Procedure Act, 1852, and the evidence ordered to be taken was in the original suit and not in the motion then before the Court.

The position therefore is that in an exceptional case where it is not possible to ascertain the essential facts witnesses may, with consent of the Court, be called. But in the motion now before me the witnesses whom Mr. Jayaswal desires to call could have given evidence by affidavit. They have not done so and this

omission is not a ground on which an application to call them as witnesses can be successfully based. On Mr. Sault's preliminary objection therefore I decide in his favour and rule, that for the present at all events, oral evidence in support of the respondent cannot be given.

The position therefore is now unusual and complicated and I will hear argument by Counsel on the appropriate action to be adopted.

Ruling accordingly.

ABU BAKAR BIN HAJI ABDUL RAHMAN v. THE COLLECTOR OF LAND REVENUE, MALACCA.

[Orig. Civ. Juris. (Pretheroe, J.) May 9, 1950]

[Malacca — Reference No. 1 of 1949]

Land Acquisition Ordinance (Cap. 128) — Acquisition of land — Assessment of compensation — Reference to High Court — Costs.

In this case certain lands in Malacca were required for a public purpose and the Collector of Land Revenue assessed the compensation to be allowed as $1,027.81. The owner of the property declined to accept this amount as compensation on the ground that it was totally inadequate and required the Collector of Land Revenue to refer the matter for the determination of the High Court under section 18 of the Land Acquisition Ordinance.

Held, (1) that the valuation in respect of the lands including the demolition value of the bungalow on the land should be $4,158.00; (2) that as the claim was for $8,000.00 the Court was precluded by the provisions of paragraph (a) of sub-section (1) of section 33 of the Land Acquisition Ordinance from awarding costs to the applicant.

Case referred to:—

(1) *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v. Revenue Divisional Officer, Vizagapatam* (1939) 2 All E.R. 317.

REFERENCE to High Court under section 18 of the Land Acquisition Ordinance (Cap. 128).

W. H. Sault for the applicant.

H. Shepherd for the respondent.

Pretheroe, J. : — By Notification No. 103 published in the *Gazette* of the 23rd June, 1949, the Resident Commissioner of the Settlement of Malacca intimated that the plots numbered 1012 and 1015 respectively in the Mukim of Alai in the said Settlement were needed for a public purpose. Plot No. 1015 is regular in shape and has a frontage on the east side of the main Malacca — Singapore Road of approximately eighty yards and is situate near the 4¼ milestone from Malacca. The second, and smaller, plot adjoins the larger plot but is some distance back from the above-mentioned road. A bungalow of substantial proportions stands on the larger plot facing the road. The rest of that plot is covered by a grove of coconut palms and there are twenty-four fruit trees on the smaller plot.

The procedure prescribed by the Land Acquisition Ordinance was duly followed and, under section 10(1)(c) of the Ordinance, the Collector of Land Revenue assessed the compensation to be allowed as follows:—

For lot 1012	$132.81
For lot 1015	$595.00
For the building on lot 1015 ...	$300.00
Total ...	$1,027.81

The owner of the properties declined to accept this amount as compensation on the ground that "the amount of compensation is wholly inadequate" and "required" the Collector of Land Revenue to refer the matter for the determination of this Court under section 18 of the Ordinance. The reference was duly made and came before the Court on the 13th January last. On the evening of that day, accompanied by Mr. Sault, Counsel for the applicant, and Mr. Shepherd, Federal Counsel, I viewed the properties. The hearing of the evidence was concluded on the 6th March last.

At the hearing a substantial amount of evidence was led which had not been made available to the Collector. Doubtless he was entirely unaware of certain factors which have an important bearing on the assessment of the compensation properly due to the applicant.

Paragraph (a) of sub-section (1) of section 25 of the Ordinance provides that the amount of compensation to be awarded shall be the market value of properties at the date of the publication in the *Gazette* of the notification of the intention to acquire the said properties. In this case the date of publication of that notice (hereinafter referred to as the "material date") was the 23rd June, 1949. But there was complete conflict of opinion as to the method to be adopted to ascertain the "market value".

Sub-section (1) of section 25 of the Land Acquisition Ordinance is the same as sub-section (1) of section 23 of the Indian Land Acquisition Act, 1894, except that the latter contains an additional paragraph relating to standing crops and trees, and that sub-section of the Indian Act was considered by the Privy Council in *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v. Revenue Divisional Officer, Vizagapatam*[1]. In this judgment I have endeavoured to follow the principles established by that case.